No. 93-630

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Supreme Court of the United States

OCTOBER TERM, 1993

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, HOUSTON LAWYERS' ASSOCIATION, JESSE OLIVER, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEFS IN OPPOSITION AND SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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I.
THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED WITH REGARD TO ALL ISSUES

A. The Response of the Attorney General of Texas, et al.

The respondents representing the State of Texas agree that certiorari should be granted on the third question presented by the petition, viz., the propriety of the court of appeals' refusal to remand the case to the district court for a hearing on the proposed settlement of the case. This issue is also raised by the cross-petition for

certiorari filed by the State in No. 93-928. However, the State also suggests that certiorari not be granted on the other important issues raised.

We urge that, in the interest of judicial economy, all the issues should be accepted for review now.

First, one of the bases for the court of appeals' refusal to remand for a hearing on the settlement was its view with regard to the merits of the case. Thus, the question of the merits will have to be considered by this Court in resolving the settlement question.

Second, even if this Court holds that the decision of the court of appeals with regard to the settlement was incorrect, it should reach the issues we have raised with regard to the correctness of the lower court's decision on the merits to provide guidance to the courts below on remand.

Third, on the other hand, if this Court decides that the decision of the court of appeals with regard to the settlement was correct, the issues regarding the lower court's decision on the merits will be ripe for review. In light of the importance of those issues to the continuing vitality of the Voting Rights Act, they should be resolved by the Court.

Fourth, this case has been travelling between the district court, the court of appeals, and this Court without an authoritative decision on the merits of the issues raised. In the meantime, three elections have been held and another is imminent. A final decision clarifying the legal standards under which judicial elections are to be held in the State of Texas and elsewhere is, therefore, manifestly appropriate.

B. The Opposition of Judge Wood.

Judge Wood's arguments regarding the merits of the decision below are premature, and only emphasize the importance of granting certiorari. This case presents issues of substantial national importance regarding the efficacy of the Voting Rights Act that have, as yet, not been resolved by this Court. The parties have differing views as to whether the decision below complied with this Court's mandate and decision in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. ___, 115 L.Ed.2d 379 (1991). There is also a dispute over whether the decision below, particularly insofar as it holds that racial bloc voting can be explained away by partisan voting patterns and that elections not involving races between minority and white candidates should be factored into a vote dilution analysis, is consistent with *Thornburg v. Gingles*, 478 U.S. 30 (1986).

These are legal issues of the utmost importance since their resolution will govern the enforcement of the Voting Rights Act nationwide. Thus, it is well-known that African American voters tend to vote for Democratic party candidates for all levels of public office, while voters of other ethnic origin tend to vote for Republican candidates. The decision below imposes on plaintiffs in voting rights cases the additional and onerous burden of proving that racial bias, and not partisan politics, accounts for the inability of minority voters to elect candidates of their choice where such a voting pattern exists. Whether this result is a departure from the standards set by this Court in *Gingles* is presented by the first question in our petition for certiorari and should be resolved by this Court.

Judge Wood's argument that there is no conflict between the Fifth and Eleventh Circuits is simply spurious. *Nipper v. Smith*, 1 F.3d 1171 (11th Cir. 1993) is

inconsistent with the decision below. *Nipper* governs decisions in the Eleventh Circuit and produces precisely the type of conflict with regard to an issue of great national importance that this Court sits to resolve.

C. The Opposition of Judge Entz.

The Brief in Opposition of Judge Entz consists largely of a dissertation on the impact of partisan politics on this litigation. Basically, Judge Entz is unhappy that the Democratic Party won elections to the offices that, under Texas law, have the authority to speak for the State of Texas in litigation. But the party affiliations of the current Attorney General, Governor, Lieutenant Governor, Secretary of State, majorities of the house of the State legislature, and the Chief Justice of the Texas Supreme Court are simply irrelevant to the issues presented by the petition herein.

The point is that the duly elected officials of the State of Texas have sought to exercise their authority to resolve this litigation through a settlement. Judge Entz's disappointment with being on the losing side in the elections that chose those officials does not provide a basis for disapproving that settlement or even an issue properly justiciable by a federal court.

II.

THE DECISION BELOW IS INCONSISTENT WITH THE DECISION OF THE THIRD CIRCUIT IN *JENKINS V. RED CLAY CONSOL. SCHOOL DISTRICT*

Subsequent to the filing of the petition for writ of certiorari in this case, the decision of the Third Circuit in *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103 (3rd Cir. 1993) was reported.[1] That decision discusses whether and to what extent elections involving white-on-white contests should be factored into a *Gingles* analysis when the underlying claim is that the vote of minority voters has been diluted. The Third Circuit resolved this important issue in a manner inconsistent with the approach taken below.

In *Jenkins* the Third Circuit held that "As a general matter, we believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates." 4 F.3d at 1128. Therefore, plaintiffs are not required to present evidence regarding such elections. Rather, the burden is on the defendants to present such evidence if they believe it rebuts plaintiffs' showing of cohesiveness or white bloc voting. *Id.* The Third Circuit went on to discuss a number of factors that the defendants must show before results of elections that do not involve black candidates can be used. *Id.* at 1129.[2]

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[1]A petition for a writ of certiorari is pending *sub nom. Red Clay Consolidated School District Board of Education v. Jenkins*, No. 93-812.

[2]The Third Circuit requires consideration of the following factors to determine whether a white candidate may properly be considered the black community's preferred candidate: (1) the extent which the minority community has sponsored the candidate; (2) the attention

The Fifth Circuit here, on the other hand, imposed no such limitations on the use of such evidence. Rather, it relied solely on the unsupported proposition that partisan (*i.e.*, Democrat v. Republican) voting patterns could explain away all evidence of racial bloc voting no matter what the race of the candidates. The use of such a proposition is inconsistent with the Third Circuit's requirement that defendants present evidence that candidates who are not of the minority group at issue were the candidates of choice of the minority community based on specific criteria.

Certiorari should be granted to resolve the differences between the Third, Fifth and Eleventh Circuits with regard to this important issue.

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which the candidate gave to the particular needs and interests of the minority community, including the extent to which the candidate campaigned in that community; (3) the rates at which black voters turned out in comparison to elections when a minority candidate sought office; and (4) the extent to which minority candidates have run and the ease or difficulty with which a minority candidate is able to run for office. 4 F.3d at 1129.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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